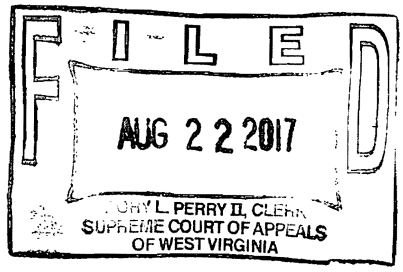

SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH, Plaintiffs Below, Petitioners,	:	
	:	Case No. 17-0206
v.	:	(Ohio County Civil Action No. 13-C-323)
ROBERT TODD GEBHARDT, MICHAEL COYNE, and TRIPLE S&D, INC., Defendants Below, Respondents.	:	

PETITIONERS TERRI L. SMITH'S AND KENNETH W. SMITH'S

REPLY TO RESPONDENT GEBHARDT'S BRIEF

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PETITIONERS' REPLY TO BRIEF OF RESPONDENT ROBERT TODD GEBHARDT

STATEMENT OF THE CASE

II. COUNTERSTATEMENT OF FACTS

A. Respondent Gebhardt's Brief states, "Petitioners testified under oath that this intentional watering resulted in damage to those corners. See Hearing Transcript Appendix pgs. 2307-2310, 2352." See Respondent Gebhardt's Brief at page 6.

That is an erroneous assessment of the evidence. As stated previously on page 20 of Petitioners' Brief:

> On cross-examination by Petitioners counsel Petitioner Terri Smith explained that there was **just a temporary change in color, from wet to dry, no permanent damage** and "**Just the same marks that's always there**. Appendix Vol. 2, pg 2333-2334, Transcript 11/14/16 pg 56, line 22 - pg 57, line 5.
>
> Petitioner Kenneth Smith testified on direct exam by Mr. Craycraft for Respondent Gebhardt at the evidentiary hearing that "**We didn't damage anything**." Appendix Vol 2, pg 2379, Transcript 11/14/16 pg 102, line 19. On cross-examination by Petitioners counsel Petitioner Kenneth Smith explained that the **water stains had been there for at least 3 years and that the testing by Terri Smith did not change them.**
> Appendix Vol. 2, pg 2384, Transcript 11/14/16 pg 107, lines 8 - 15. (Emphasis added).

B. Respondent Gebhardt's Brief states:

> "During an inspection of the home on October 9, 2014, it was discovered that Petitioners had **blocked** their foundation drainage system, thereby restricting the flow of water away from their home and **causing water intrusion and damage**."

See Respondent Gebhardt's Brief at page 6. (Emphasis added).

That is a gross erroneous assessment of the evidence. The pipe was never "blocked." No expert has opined that the screen "blocked" the pipe "causing water intrusion and damage." Those are not facts, rather they are fabrications. Although Respondent Gebhardt testified that "blocking" the away drain could cause water intrusion, he did not testify that the screen over the end of the pipe actually caused any water intrusion or damage.

Actually the inspection was on October 19, 2014, and Respondent Gebhardt's expert, Eric Drozdowski, P.E. took pictures of the "screen" over the end of the pipe. (Appendix vol 4, pg 4811-4814). One of Mr. Drozdowski's pictures actually shows water flowing from the pipe through the screen, proving the pipe was not "blocked." Appendix Vol. 4, pg 4812. Mr. Drozdowski confirmed that the screen did not "block" the pipe as water was dripping through the screen on the dry day of his inspection. He testified:

Q. Your pictures do indicate -- I think Picture No. 2 - that the -- there was **water dripping from that French drain pipe**, correct?

A. Yes.

Q. But it was not raining that day, correct?

A. No. No, it was not. Appendix Vol. 3, pg 2804, Drozdowski depo Pg 10, lines 12-17. (Emphasis added).

C. Regarding the removal of the screen from the away drain of the French drain system the day after Mr. Gebhardt's deposition, Respondent Gebhardt's Brief states, "...Petitioners destroyed the evidence." See Respondent Gebhardt's Brief at page 7.

Respondent Gebhardt's expert, Eric Drowdowski, P.E. had already inspected and photographed the screen and the pipe, preserving that evidence for trial. Respondent Gebhardt's counsel was present and saw the evidence of dripping too, but now argues the pipe was blocked.

Respondent Kenneth Smith testified at the evidentiary hearing:

Q. That pipe was blocked, sir; wasn't it?

A. **No. There was water flowing out the pipe.**

Q. And who, other that you, can testify to that at this point?

A. Probably **all you guys over there had seen water coming out of that pipe.** Appendix Vol. 2, pg 2355, lines 11-16.(Emphasis added).

Petitioners knew Respondent Gebhardt's counsel and expert had seen the screen on the pipe which permitted water flow and had photographed the water coming through the screen. The screen was removed to avoid a claim that they intentionally failed to mitigate their damages after they had been made aware of the potential problem the screen could cause. Appendix Vol. 2, pg 2385, lines 4-14. They took pictures of the screen being removed, voluntarily provided them to Respondent and placed the screen in a plastic bag without hosing it off so that it could be inspected. Appendix Vol. 2, pg 2385, line 18 to page 2386, line 24.

Respondent Terri Smith testified at the evidentiary hearing:

Q. Did you destroy anything or just take – have Ken take it off?

A. Just took it off.

Q. And keep it?

A. Yes.

Q. Nothing's been destroyed?

A. No.

Q. No, it hasn't been destroyed?

A. No, it has not. Appendix Vol. 2, pg 2338, lines 10-18.

D. Regarding the loose bannister to the Petitioners basement, Respondent Gebhardt's Brief states:

> "...**Petitioners, Petitioners' counsel and Petitioners' expert, John Gongola,** had deconstructed a connection between the basement stairs and cement floor. See Appendix pgs 1149-1152. **A hole was created** and the area beneath the slab allegedly manipulated and examined." (Emphasis added).

See Respondent Gebhardt's Brief at page 8.

That is a gross erroneous assessment of the evidence as the hole was actually created by Respondent Gebhardt.

During the evidentiary hearing Respondent Gebhardt's counsel asked whether either Petitioner, Terri or Kennneth Smith, made the hole in the concrete basement floor, which was denied. Appendix Vol. 2, pg 2363, lines 11-23. Apparently Respondent Gebhardt's counsel "forgot" that Respondent Gebhardt had testified that he personally made the hole in his efforts to fortify the bannister by placing steel rebar down into the hole in the cement and then up into post for the bannister. Respondent Gebhardt testified at his deposition:

> Q. You indicated that you did everything humanly possible to tighten that railing going down into the basement, correct?
>
> A. Correct.
>
> Q. But **you didn't drill a hole into the concrete** and put a steel rod in it like you and I discussed on April, 2013, which you indicated several times was a good or great idea.
>
> A. **Yes, I did do that.** Appendix Vol. 3, pg 3240, Gebhardt depo pg, 192, lines 14-22. (Emphasis added).

Even the Trial Court notes in the Order dismissing the case that the hole was made by Respondent Gebhardt. The Order states:

> Mr. Smith admitted that at Plaintiffs' counsel's direction, he disassembled the Newel post from the bannister at the bottom of the steps to the basement and that he lifted off a metal rod that had been placed **in a hole through the concrete by Gebhardt** to make the Newel post more secure.

Appendix Vol.1. pg 11.

E. Regarding the trial subpoena duces tecum, Respondent Gebhardt's Brief states:

> Petitioners admitted that a subpoena duces tecum was served upon Respondent Gebhardt at his home less than a week before trial commanding him to appear in **Marshall County, West Virginia**... See Hearing Transcript, Appendix pgs. 2331-2332."

See Respondent Gebhardt's Brief at page 10. (Emphasis added).

That is an erroneous assessment of the evidence. Petitioner Kenneth Smith testified at the evidentiary hearing as follows:

> Q. You didn't know that someone was going to be sent over there? (To Gebhardt's house to serve subpoena)
>
> A. I did not. Appendix Vol. 2, pg 2331, lines 12-14.

Pages 2331-2332 of the Appendix cited by Respondent do not even contain the words "Marshall County, West Virginia" so Respondent Gebhardt's Brief arguing that Petitioners admitted, or even knew that the subpoena commanded appearance in Marshall County is erroneous.

F. Regarding service of the trial subpoena duces tecum, Respondent Gebhardt's Brief states:

> Respondent Gebhardt testified that he then engaged in **communication with the unknown third party** for a period of 8 to 10 minutes, which included discussion of the invoices requested by the subpoena and how Gebhardt may obtain the same.

See Respondent Gebhardt's Brief at page 10. (Emphasis added).

Actually, Respondent Gebhardt knew of the process server, John Dan Livingston, who had previously been a truck driver. Respondent Gebhardt testified at the evidentiary hearing as follows:

> No. I live on a dead end street and – um – it's pretty hard to get to unless you know where it is. And it was after dark, probably about 6:30. I just happened to be in the garage and I see a car pull in and a guy gets out and I'm thinking, "Who is this? What's this about?" And – um –he hands me a piece of paper saying that – um – they're requesting some invoices for gravel that was used on the Smith's job. And I said, "Who are you?" and he introduced himself and called me by name when he got out of the car, so he knew me. And it turns out **he was a driver for Kittle Hauling, who I used to have haul gravel years ago**. Hadn't used them, probably, for about eight years. And then he went ahead and told me that they'd been out of business for about seven years. So, that was pretty much it. Appendix Vol. 2, pg 2398, lines 1-16. (Emphasis added).

Other than discussion about the past relationship between Respondent Gebhardt and the process server, Mr. Livingston, and the requested gravel receipts, nothing else about the case or

the subpoena was discussed. Appendix Vol. 2, pgs 2397 -2403. Respondent Gebhardt testified:

Q. When Dan Livingston came out to your house, did he do anything to intimidate you?

A. No.

Q. Did he threaten you?

A. No. Appendix Vol. 2, pg 2411, lines 5-9.

....

Q. Did Mr. Livingston tell you how to testify?

A. No.

Q. He didn't say anything was going to be bad that was going to happen to you physically, emotionally or anything else?

A. No.

Q. You don't know – you have no facts to prove that Dan Livingston was sent there to pump you for information by me; do you?

A. No. Appendix Vol. 2, pg 2411, line 22 to pg 2412, line 7.

...

Q. What additional facts do you have regarding witness tampering?

A. Just what I told you. Appendix Vol. 2, pg 2413, lines 1-3.

G. Neither Respondent Gebhardt's Brief or the Trial Court's 27 page Order dismissing the case mentions "witness tampering". See Respondent Gebhardt's Brief in its entirety and entireTrial Court Order Appendix Vol. 1, pgs 1-27.

Respondent Gebhardt's Motion to Dismiss led the Trial Court to postpone the trial via email due to allegations it took "very seriously."

Other than the allegations of witness tampering relating to the subpoena duces tecum served on Respondent Gebhardt, there were no other new matters addressed in the Motion to Dismiss. Appendix Vol 2. pg 1864-1870.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners, Terri Smith and Kenneth Smith, by counsel, believe that the decisional process would be significantly aided by oral argument. Petitioners' counsel requests oral argument pursuant to Rule 19(a)(1) as this case involves assignments of error in the application of settled law, pursuant to Rule 19(a)(2) as there was an unsustainable exercise of discretion where the law governing discretion is settled and pursuant to Rule 19(a)(3) as there was insufficient evidence for dismissal or dismissal was against the weight of the evidence.

ARGUMENT

1. THE TRIAL COURT ERRONEOUSLY ASSESSED THE EVIDENCE

Respondent Gebhardt's Brief states, "What is most remarkable is that Petitioners have admitted to each and every instance of the misconduct alleged . . ." Respondent Gebhardt's Brief at page 14.

That is a true statement, almost. Petitioners have admitted everything except the allegation of witness tampering. Glaringly missing from Respondent Gebhardt's Brief before this Supreme Court of Appeals is any argument concerning the previously alleged "witness tampering." In Respondent Gebhardt's Motion to Dismiss which led the Trial Court to postpone the trial and ultimately dismiss the case there were no new allegations of wrongdoing other than service of the subpoena duces tecum upon Respondent Gebhardt without notice which was labeled "witness tampering." Appendix Vol 2. pg 1869.

Witness tampering is a criminal offense under *West Virginia Code*, § 61-5-27 and a serious allegation. No Trial Court could be faulted for postponing a trial or dismissing a case if witness tampering were proven. In this case there is no proof of witness tampering. Trial Court's 27 page Order dismissing the case makes no findings or conclusions of law or even mentions "witness tampering." Appendix Vol. 1, pgs 1-17.

Petitioners voluntarily disclosed, and thereafter admitted, everything else. Without the voluntary disclosure, Respondent would not have known about the matters of which he complains. It began with the Complaint which expressly stated the dates and duration of each water hose test in paragraphs 50, 51 and 58. Appendix Vol. 2, pgs. 138, 140. Pictures of the water hose tests were also provided. Appendix Vol. 6, pg. 6710 - 6738. Petitioners testified that Respondent did water hose tests before they did, which Respondent Gebhardt did not deny. Appendix Vol. 3, pg. 3210, Gebhardt Deposition, page 152, line 11-19.

Prior to the filing of the Complaint, a conversation with Respondent Gebhardt was recorded without his knowledge. The recording was voluntarily provided to Respondent's counsel.

Petitioners duct taped a piece of screen over the away drain of their French drain system prior to the filing of the Complaint and have alleged that it was at the suggestion of Respondent Gebhardt. Petitioners left it there for Respondent, Respondent's counsel and experts to inspect.

After the Complaint was filed on September 27, 2013, Petitioners' counsel had Jake Lammott of Ground Penetrating Radar spray orange lines of the bare concrete block walls in two small rooms of the basement to show where the blocks were not poured solid with concrete on August 13, 2014. Petitioners provided Respondent's counsel with a report and pictures.

On September 25, 2014, Petitioners' counsel had John Gongola of S&D Environmental do air sampling to test for mold and voluntarily provided the testing results to Respondent.

On October 19, 2014, Respondent Gebhardt's expert, Eric Drozdowski, P.E., inspected the premises without objection by Petitioners.

After Respondent Gebhardt's expert, Eric Drozdowski, P.E., formally did a Rule 35 inspection of the property Petitioners removed the screen over the end of the French drain pipe

then voluntarily advised the Respondent's counsel and provided pictures of the removal.

Mr. Drozdowski has not reported, opined or given any testimony that the actions of the Plaintiffs made it "impossible" or even more difficult to determine the sources of water intrusion into Petitioners' home. He did admit that there may be water intrusion "possibly through the brick veneer." Appendix Vol. 3, pgs.2856-2857, Drozdowski Deposition, page 62, line 23 to page 63, line 22.

Mr. Drozdowski testified that water could have infiltrated the home from the joint between the concrete floor and the cement block. Transcript Vol. 3, pg. 2844, Drozdowski Deposition, page 50, line 3-7.

Mr. Drozdowski did exclude water coming through the exterior of the closets in the home. Appendix Vol. 3, pg. 2853, Drozdowski Deposition, page 59, line 18-24. Mr. Drozdowski admitted that he had not done a flow analysis of the down spout or the French drain system. Appendix Vol. 3, pg. 2867, Drozdowski Deposition, page 73, line 22-24.

Mr. Drozdowski testified that the type of water intrusion into the home was not consistent with a high water table or presence of a spring. Appendix Vol. 3, pg. 2910, Drozdowski Deposition, page 116, line 2-16.

Mr. Drozdowski testified that where the brick was removed, "I did not see any water staining behind the brick that was removed , on the Tyvek or on the wood structure which would suggest to me that there was no water intrusion through the brick veneer at that location." Appendix Vol. 3, pgs. 2845-2846, Drozowski Deposition, page 51, line 21 to page 52, line2. Accordingly, the brick removal could not have prejudiced any investigation of the causation of the water intrusion.

Mr. Drozdowski's only criticism of Petitioners doing the water hose test on their home

was that they were "not replicating a natural precipitation occurrence." Appendix Vol. 3, pg. 2920, Drozdowski Deposition, page 126, line 4-13.

Mr. Drozdowski did not testify that any of Petitioners' actions prevented him from giving opinions regarding water intrusion.

As noted on page 17 of Petitioners' Appeal Brief, 100 pictures of the unfinished basement walls were taken before the lawsuit was filed and produced in discovery. Respondent's counsel, P. Joseph Craycraft, Esquire, was permitted to do informal inspections of the property on December 19, 2013, and February 18, 2014, before the orange lines were painted or the air testing was done. He took pictures of the premises. Hundreds of pictures have been taken thereafter. No new water damage or infiltration has been identified.

No witness has testified that Petitioners' actions prejudiced any person in their quest to determine the source of the water infiltration. Significantly, Respondent Gebhardt's Brief does not argue that he was prejudiced by Petitioners' actions.

However, the Trial Court's Order dismissing the case found that:

> Each of these actions irretrievably taints evidence and contaminates Plaintiffs' claim that Gebhardt's negligence proximately caused the water intrusion and resulting damages.

Appendix Vol. 1, pg. 19.

The Trial Court's Order did not base that finding of fact on any actual evidence or testimony. Appendix Vol. 1, pg. 1-27.

The Trial Court's Order dismissing the case also stated:

> It would be exceedingly difficult if not impossible for a trier of fact to determine which instances of water intrusion and resulting water stains were caused by Gebhardt's negligence, if any, and which were caused by Plaintiffs' self-inflicted actions . . .

Appendix Vol. 1, pg. 20.

The Trial Court's Order does not base that finding of fact on any actual evidence or

testimony. Appendix Vol. 1, pg. 1-27.

When spoliation of evidence occurs "under appropriate circumstances, an adverse inference instruction may be given **or sanctions** levied where physical evidence was destroyed by a party to an action." (Emphasis added). *Hannah v. Heeter*, 213 W.Va. 407, 584 S.E.2d 560, 567 (2003). The *Hannah* Court then quoted Syl. Pt. 2 of *Tracy v. Cottrell*, 206 W.Va. 363, 524 S.E.2d 879 (1999) as follows:

> Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors ***must*** be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) ***the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether the prejudice was substantial***; (3) the reasonableness of anticipating the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. ***The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four factors spoliation test.*** If, however, the trial court finds that the party charged with spoliation did not control, own, possess or have authority over the destroyed evidence, the requisite analysis ends and no adverse inference instruction may be given or other sanction imposed.(Emphasis added).

Syl. Pt. 2, *Tracy*, Supra. (Emphasis added.) *Hannah*, 584 S.E.2d at 567.

There is no evidence whatsoever that Petitioners' actions actually resulted in prejudice to Respondent Gebhardt. Respondent Gebhardt had failed to satisfy the all "four factors spoliation test" of Syl. Pt. 2, *Tracy*, Supra. which requires proof of prejudice as one of the four (4) mandatary elements that "***must*** be considered." (Emphasis added).

Respondent's engineer expert, Eric Drozdowski, and mold expert, Charles Guinther, have taken hundreds of pictures of the home. They have identified no pictures to show any increased or "new" water staining or damage to the home. Neither expert has given an opinion that Petitioners conduct hampered their abilities to evaluate the home and Mr. Guinther indicated that the testing done by Petitioners' expert, John Gongola, was reliable, leading the Trial Court to previously expressly find no prejudice and permit Mr. Gongola's testing evidence at trial. Appendix Vol. 1, pg 128.

Any prejudice is unsupported by fact. The Trial Court's finding that it would be "exceedingly difficult if not impossible for a trier of fact to determine which instances of water intrusion and resulting stains were caused by Gebhardt's negligence, if any, and which were caused by Plaintiffs' self-inflicted actions" is a finding that is not based upon any evidence whatsoever. Appendix Vol. 1, pg. 20.

The lack of prejudice is also especially apparent where, yes, 18-1/2 bricks were taken off a wall, but over 2,100 bricks remain to be disassembled from the wall and inspected, if wanted. Air sampling tests were done and there are millions of cubic centimeters of air remaining in the home to test, if wanted. The Newel post of the bannister was disassembled and reassembled without any destruction, which could be done by Respondent Gebhardt's expert, if wanted. All such offers were declined.

Orange painted lines were placed on the walls of two small basement rooms of unfinished cement block walls which did not destroy the walls or significantly cover over the water stains. The screen was taken off the away drain and preserved. Before and after pictures exist of each and every item. Petitioners voluntarily provided Respondent with the evidence as they did not have anything to hide because there was no actual spoliation of all of the evidence. Even though some brick was removed from the wall, the remaining wall is there for inspection. Respondent was given the opportunity to do the same type of testing to the wall, the bannister and air sampling, but declined. Flow evaluations regarding the down spout and French drain system could have been done, however, Respondent declined.

Each of the spoliation claims fail as the physical evidence remains to be tested or analyzed. Spoliation cases are cases where evidence is entirely lost or materially altered or contaminated. Emplaning the four (4) factor "four factors spoliation test" of Syl. Pt. 2, *Tracy*, Supra. in the case of *Kominar v. Health Management Associates of West Virginia*, 220 W.Va. 542, 648 S.E.2d 48 (2007), it is stated:

> These required factors advance the purpose of an adverse inference instruction on spoilation, that is, permitting the jury to assume that the reason that the evidence was altered or destroyed was because it was unfavorable to the position of the offending party.

Kominar, 648 S.E.2d at 60. (Emphasis added).

In this case the evidence is still available for Respondent to fully use, test, evaluate and use at trial. Nothing has been "altered or destroyed" "because it was unfavorable to the position" of Petitioners. The evidence is all favorable to them and Respondent has elected not to do testing on the remaining evidence as additional testing likely will also be favorable to Petitioners.

As there is no evidence or finding of prejudice pursuant to *Tracy, Supra.*, that lack of prejudice would not even permit an adverse inference jury instruction, let alone sanctions, especially dismissal.

A fair assessment of the evidence requires a trial on the merits. **Mr. Gebhardt has admitted the water problems before any actions of the Petitioners** and testified:

> Q. With all the water problems that they've had with that house, do you think that you've lived up to the representations that you made to them?
>
> MR. CRAYCRAFT: Object to form.
>
> A. Ron, I didn't do anything different than I've done over many, many homes over the years. I regret that this problem occurred. I think it can be fixed. I really don't know why it's happened. I did everything I could do to rectify the problem.

Appendix Vol. 3, pg. 3200, Gebhardt Deposition, page 152, line 1-9.

2. THE TRIAL COURT ERRONEOUSLY ASSESSED THE LAW

A. Petitioners' counsel recorded a conversation with Respondent Gebhardt without giving Mr. Gebhardt prior notice pursuant to the statutory right contained in *West Virginia Code*, § 62-1D-3(e) which only requires consent of one person to the conversation. This has been acknowledged by this Supreme Court as the "one-party consent rule." *State v. Burnside*,

233W.Va.273, 757 S.E.2d 803, 805 (2014).

The Trial Court erroneously assessed the law indicating that the recording was one of its reasons in the Order dismissing the case stating:

"Just because something is legal, doesn't make it right." Appendix Vol 1, pg 23.

B. Petitioners' counsel identified Respondents' non- testifying consultant, Phil Huffner, as an expert witness on Petitioners' Third Expert Witness Disclosure served July 3, 2015. Appendix Vol 1, pg 1074. Thereafter Petitioners' counsel decided to abandon Mr. Huffner as a witness and Mr. Huffner **was not listed as an expert or a fact witness** on Plaintiffs' Pretrial Memorandum served October 13, 2015, (Appendix Vol 2, pg 1688-1689) or Plaintiffs' Second Pretrial Memorandum filed October 27, 2016. Appendix Vol 2, pg 1795-1796.

There is no evidence that any "confidential or privileged information was disclosed" by Mr. Huffner to Petitioners' counsel. It was Respondent Gebhardt's "burden" to prove "confidential or privileged information was disclosed", and if not, Petitioners could have legally and properly utilized Mr. Huffner as an expert. See Syl. Pt. 3, *State of West Virginia ex rel. Billups v. Clawges*, 218 W.Va. 22, 620 S.E. 2d 162 (2005).

The Trail Court's Order states that, "The retention of Mr. Huffner by Plaintiffs is fundamentally and patently unfair to Gebhardt." Appendix Vol 1. Pg 25. Absent evidence from Respondent Gebhardt that "confidential or privileged information was disclosed" this is an erroneous assessment of the law. Further, though not mentioned above, it was an erroneous assessment of the evidence as Mr. Huffner was never "retained" by Petitioners or their counsel as Mr. Huffner refused to further communicate after he indicated that the home was a "tear down" based on his review of pictures and he was completely abandoned as a witness.

C. There is no evidence whatsoever that the process server, John Dan Livingston, who

delivered the subpoena to Respondent Gebhardt was sent there by Petitioners or their counsel with instructions to do anything but serve the subpoena.

Petitioners' counsel herein filed a sworn Affidavit stating, in part, that "at no time" "did I request or infer that Dan Livingston should engage in any conversation or try to elicit any information from Robert Todd Gebhardt" and "I only requested that Mr. Livingston serve the Subpoenas." Appendix Vol. 3 Pg 2095.

The Trial Court's Order cites the case of *Kocher v. Oxford Life Ins. Co.*, 216 W.Va. 56, 602 S.E2d 499 (2004). Appendix Vol1, pg 26. In *Kocher*, the Defendant's Senior Vice President, Larry Goodyear, visited Plaintiff Kocher's home in an attempt to try to settle the case without the benefit of Mr. Kocher having counsel. Mr. Goodyear had his secretary pretend to be a Federal Express employee to get Mr. Kocher's address. *Kocher*, 602 S.E.2d at 501. Mr. Goodyear lied at his deposition about how he got the directions. *Kocher*, 602 S.E.2d at 502.

The Trial Court's comparison of this case with *Kocher* and giving an ultimate sanction is clearly an erroneous assessment of the law and evidence.

It is worthwhile noticing that Respondent Gebhardt's counsel, without notice, personally served a subpoena duces tecum to Petitioners' counsel for all records, expressly including confidential "medical records", from a prior unrelated automobile personal injury lawsuit. Appendix Vol 1, Pgs 575-576. A Motion to Quash the Subpoena was made. Appendix Vol 1, Pg 583. The issue of notice of the subpoena was not significant as Petitioners' counsel was the same in this case as that unrelated case.

However, Respondent Gebhardt's counsel, without prior notice, then sent a subpoena duces tecum to attorney Dennis Fritch, who had defended the unrelated personal injury case brought by Petitioners for "all records" which would have included the confidential medical

records. It is not in the Appendix, but is referenced as Docket Entry Line 224 "09/04/15 PL'S MOTION TO QUASH SUBPOENA 7 DEPOSITION OF DENNIS FRITCH; COS." Appendix Vol. 6, pg 6859, Line 224.

That subpoena was in direct violation of Syl. Pt. 2, *Keplinger v. Virginia Electric and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2002) requiring notice of a subpoena to a nonparty requesting medical records.

D. The Trial Court's Order identified Petitioners' disclosure of John Gongola as an expert regarding the hazards of mold, construction deficiencies and mold remediation as part of the reasons supporting dismissal indicating he was unqualified. Appendix Vol. 1, pg 17. That disqualification was an erroneous assessment of the law and the evidence.

> In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation © which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Syl. Pt. 5, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

> Unless an engineer's opinion is derived from the methods and procedures of science, his or her testimony is generally considered technical in nature, and not scientific. Therefore, a court considering the admissibility of such evidence should not apply the gatekeeper analysis set forth by this Court in *Wilt v. Buracker*, 191 W.Va. 39. 443 S.E.2d 196 (1993), and *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

Syl. Pt. 3, *Watson v. Inco Alloys*, 209 W.Va. 234, 545 S.E.2d 294 (2001).

John Gongola is an "industrial hygienist" Certification No. 308569 by the American Conference of Governmental Industrial Hygienists (ACGIH) Appendix Vol. 2, pg 1670.

The federal government recognizes the ACGIH in many of its regulations, including but not limited to the regulations of the Occupational Health and Safety Administration (OSHA), see 29 C.F.R. §1910.6(b), and the Clean Air Act, see 40 C.F.R. §63.1503.

Mr. Gongola testified regarding the generally accepted standards upon which he relied for acceptable versus unacceptable limits for fungal (mold) contamination as follows:

> U.S. Department of Housing and Urban Development, Healthy Home Issues, Version 3, March of 2006; New York City Department of Health and Mental Hygiene, Guidelines on Assessment and Remediation of Fungi in Indoor Environments, November 2008; Centers for Disease Control, CDC, Sampling and Characterization of Bioaerosols; NIOSH Manual of Analytical Methods, January of 1998; the institution - - or Institute of Inspection Cleaning and Restoration and Certification; ANSI Approved IICRC S520 Standard and Reference Guide for Professional Mold Remediation, Second Edition; IICRC S500 Standard and Reference Guide for Professional Water Damage Restoration, Third Edition; the American Conference of Governmental Industrial Hygienists World Wide; Bioaerosols Assessment and Control.

Appendix Vol. 4, pgs 4452-4453. Gongola Deposition, page 40, line 8 to page 41, line 2.

John Gongola's CV indicates that he has extensive experience in all areas of indoor air quality, hazardous materials management and related building sciences. The CV explains that a Certified Indoor Environmentalist (CIE) must have training from a "wide range of disciplines" including "Building Sciences," "design, construction and operation of buildings," "building codes," "weather proofing" and "moisture flows." Appendix Vol 2, pg 1671.

> I was contracted to assess and investigate the environmental quality of the home, ok? That's the basis of my report. Now, in doing so, **it is my practice, as with all environmental practitioners, to determine a causation for those environmental anomalies or adverse conditions**. You following me?
>
> In doing so, we refer to reference materials, of which I brought a lot with me today. **One of them is the West Virginia Code of State Regulations**. In order to determine if certain component of a house is contributing to the environmental issues that I've been contracted to perform and to assess, **I need to determine, based on the Code, which is standard of practice, if the components, which upon observation and analytical testing, are failing** and if those components were properly installed.
>
> My report is not a structural report. My report is not a contractor's report. There are other experts in this case that will testify to that. Mine, if you read it, is an environmental report. And **the other reason for utilizing the State Codes is to point to causation and failure of building components related to environmental issues.**

Appendix Vol. 4, pgs 4436-7.Gongola Depo, page 24, line 22 to page 25, line 21. (Emphasis added).

Mr. Gongola's report specifically identifies the construction deficiencies and specifically

identifies the sections of the Building code that are violated. Appendix Vol.6, pgs6257-6275. Mr. Gongola's report specifically identifies violations go back over 20 years of the Building Codes recognized in the West Virginia Code of Regulations title 87, Series 4. Appendix Vol. 6, pg 6267-6268. Those Building Codes Mr. Gongola identified in his report include:

> The West Virginia Code of State Regulations, Title 87, Series 4, effective April 28, 1989, which adopted the CABO One- and Two-Family Dwelling Code 1986 Edition;
>
> The West Virginia Code of State Regulations, Title 87, Series 4, effective June 1, 1997, which adopted the CABO One and Two Family Dwellings Code, 1995 Edition;
>
> The April 1, 2003, the West Virginia Code of State Regulations, Title 87, Series 4, which adopted the International Residential Code, 2000 Edition; and
>
> The July 1, 2010,West Virginia Code of State Regulations, Title 87, Series 4, which adopted the 2009 International Residential Code for One and Two Family Dwellings.

See Gongola Report, Appendix Vol. 6, pgs 6257-6274.

The construction opinions that Mr. Gongola has made all relate to violations of the State Building Code. Interestingly, Respondents' expert engineers, Lorey Caldwell, P.E. and Eric Drozdowski, P.E. both agreed to those violations. This indicates the testimony is reliable.

As indicated in Mr. Gongola's CV, (Appendix Vol. 2, Pg 1668, Exhibit 1, at page 3), he has undergone counsel-certified microbial remediation supervisor training that included indoor environmental quality issues pertaining to supervision of microbial and fungal remediation projects, remediation guidelines and protocols. From 2006, to 2010, he had instruction from the Environmental Information Association in Phoenix, Arizona that contained instruction on fungal contaminants and hazardous materials remediation. He does not do the actual remediation work himself and refers it to a certified contractor. However, he writes the protocols and is aware of anticipated and actual costs. Mr. Gongola testified that in 20 years he had investigated 6,000 cases reviewing building codes. Appendix Vol. 4. Pg 4555,Gongola Deposition, page 143, line 19.

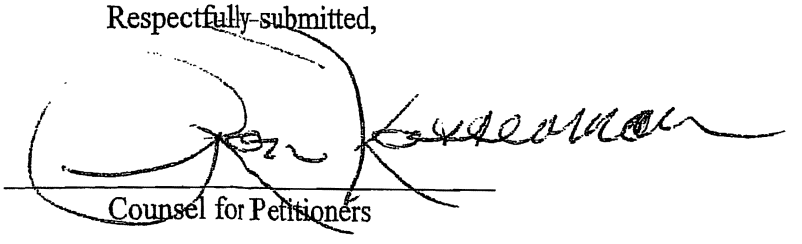
Regarding his estimate of $130,000.00 for the remediation, it was based upon projects he had done in the last 24 months, based on the square footage of the home and the type of contamination and damage he observed. Appendix Vol. 4, Pg 4502, Gongola Deposition, page 90, lines 2 - 15. Mr. Gongola testified, "we use the IICRC S520 Standard Reference Guide for Mold Remediation." Appendix Vol. 4, Pg 4504,Gongola Deposition, page 93, lines 19-20.

Mr. Gongola meets all qualifications of Syl. Pt 5 of *Gentry*, his testimony is reliable and would be helpful to a jury. The Trial Court's exclusion of his opinions on the hazards of mold, construction issues relating to water infiltration causation and remediation costs was erroneous.

CONCLUSION

Petitioners pray that the Trial Court's Order of February 2, 2017, be reversed and this case be remanded for trial, with directions to permit the expert opinion of John Gongola on the hazards or potential adverse effects of mold, construction issues relating to water infiltration causation and estimates related to the costs of mold remediation.

Respectfully submitted,



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SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH, Plaintiffs Below, Petitioners,	:	
	:	Case No. 17-0206
v.	:	(Ohio County Civil Action No. 13-C-323)
ROBERT TODD GEBHARDT, MICHAEL COYNE, and TRIPLE S&D, INC., Defendants Below, Respondents.	:	

CERTIFICATE OF SERVICE

Service of the foregoing Petitioners' Reply to Brief of Respondent Robert Todd Gebhardt, was had upon the parties herein, by emailing and by mailing true and correct copies thereof, on August 18, 2017, as follows:

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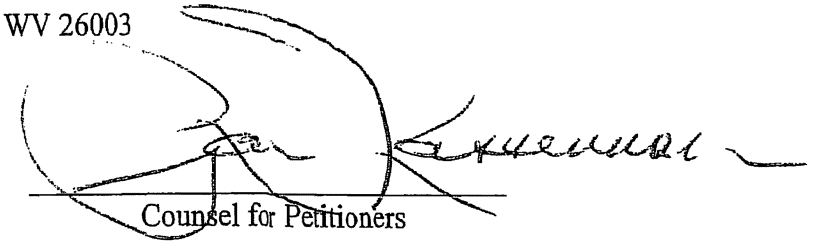

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